

INDUSTRIAL MEDICAL COUNCIL
DEPARTMENT OF INDUSTRIAL RELATIONS

NOTICE OF PROPOSED ACTION TO ADOPT AND AMEND
CALIFORNIA CODE OF REGULATIONS, TITLE 8, CHAPTER 1
VARIOUS SECTIONS 1 through 158

Prepared by:

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TITLE 8. Industrial Medical Council

NOTICE OF PROPOSED RULEMAKING

The Industrial Medical Council ("IMC") proposes to amend regulations governing the Qualified Medical Evaluator program. The existing regulations are found in Chapter 1, commencing with Section 1, of Title 8 of the California Code of Regulations. The proposed amendments will clarify existing regulations and make the Qualified Medical Evaluator program operate more effectively. The IMC proposes to adopt these amendments and these new regulations after considering all comments, objections, or recommendations regarding the proposed action.

WRITTEN COMMENT PERIOD, AGENCY CONTACTS

Written Comment Period:

Any person or authorized representative may submit written comments relevant to the proposed regulatory action to the IMC at the addresses listed below. The written comment period closes on November 17, 2003, at 5:00 p.m., and the IMC will consider only those comments which are received by that deadline. Written comments may be submitted by letter, facsimile, or e-mail by as follows (Comments by email are preferred, and will save the agency personnel time and taxpayer dollars in responding to them):

Industrial Medical Council, Regulations
P.O.B. 8888
San Francisco, CA 94128
Facsimile: (650) 737-2637
E-mail: imcrules@hq.dir.ca.gov

Written comments may also be submitted in person at the offices of the IMC at the following street address:

Industrial Medical Council
395 Oyster Point Blvd, Suite 102
South San Francisco, California

All written comments will be given consideration by the IMC, regardless of which mode of delivery is chosen.

Agency Contacts:

Nonsubstantive inquiries concerning this action, such as requests to be added to the mailing list

for rulemaking notices, requests for copies of the text of the proposed regulations, for the Initial Statement of Reasons, and for any supplemental information contained in the rulemaking file may be directed to the contact person. The contact person is:

Annadessa Gregorio
Industrial Medical Council
P.O. B. 8888
San Francisco, CA 94128-8888
(650) 737-2700

BACK-UP CONTACT PERSON / CONTACT PERSON FOR SUBSTANTIVE QUESTIONS

To obtain responses to questions regarding the substance of the proposed regulations, or in the event the contact person is unavailable, inquiries should be directed to:

Richard Starkeson
Industrial Medical Council
P.O. B. 8888
San Francisco, CA 94128-8888
(650) 737-2700

The IMC will hold a public hearing on the regulations if, no later than 15 days before the end of the written comment period, it receives a written request for a public hearing from any interested person or his or her authorized representative.

AUTHORITY AND REFERENCE

AUTHORITY: Labor Code sections 59, 139, 139.2

REFERENCE: Labor Code Sections 139, 139.2, 4061, 4062

INFORMATIVE DIGEST / POLICY STATEMENT OVERVIEW

Overview:

The IMC is charged under Labor Code section 139 et seq., with administering the Qualified Medical Evaluator program in workers compensation. Qualified Medical Evaluators (QME's) examine employees for workers compensation injury claims, and make evaluations of disability upon which Workers Compensation Appeals Board decisions may be based. In most cases, for unrepresented employees, the reports of a QME and of treating physicians are the only medical evaluations used in determining disability.

The Qualified Medical Evaluator regulations have not been amended since 1999. It has since come to the attention of the IMC that there are problems with some regulations, some appear to be ambiguous, and some new regulations are necessary to effectively carry out the Qualified Medical Evaluator program mandated by Labor Code section 139

The Industrial Medical Council is proposing to amend the Qualified Medical Evaluator regulations and reorganize some of the regulations, so that they are more understandable.

INFORMATIVE DIGEST

The IMC proposes to amend regulations found in Chapter 1, sections 1 through 158, Title 8 of the California Code of Regulations and adopt new regulations.

The proposals are a combination of substantive and non-substantive changes.

The IMC did not consider any alternatives to any of the proposed changes to the existing regulations. These regulations have been in their current form since 1999, and amendments are necessary to remove some ambiguities and eliminate problems in Qualified Medical Evaluator program administration.

The IMC proposes to amend sections 1, 10, 11, 11.5, 14, 15, 17, 18, 19, 20, 30, 31, 31.5, 32, 33, 34, 35, 35.5, 36, 38, 39, 39, 40, 41, 49, 49.2, 49.4, 49.6, 49.8, 49.9, 50, 52, 60, 61, 62, 156, 157, and 158, and to adopt sections 21, 33.5, 58 and 63.

In all Sections, wherever they appeared, the phrase ***injured worker*** and the word ***worker*** were replaced by the word ***employee***, (in both singular and plural forms) for clarity and consistency. The Labor Code uses the term ***employee*** to refer to the injured worker throughout the sections dealing with workers' compensation. The regulations had used both employee and injured worker at various points, without any reason for the distinction. If a Section has no other proposed changes, it is not further mentioned in this digest.

Section 1.

This is a section of definitions. It is reordered and subsections are re-lettered, so that all items are listed alphabetically. There are minor changes to the definitions of the terms **AME, Comprehensive Medical-Legal Evaluation, Continuing Education Program, Direct Medical Treatment, Provider, Evaluator, Qualified Medical Evaluator, Rebuttal examination, Course, Treatment Guideline, Employer**. New terms **QME** and **QME Competency Examination for Acupuncturists** were defined, the term QME being moved from Section 49.

Section 10.

This section provides for the appointment process for a QME. This section was amended to add that a physician who is on probation from the physician's licensing board or who has been convicted of a crime may be denied appointment. Although this has been the past practice, there was no specific regulation authorizing it. It also would provide that physicians whose license is

currently suspended may not be appointed, and that physicians must be of good moral character to be appointed. Physicians whose appointment had been revoked in the past would have to establish their rehabilitation before being appointed. Physicians who had resigned or did not renew their appointment while under investigation or accusation, would be subject to the continuation of the investigation or accusation if they reapplied for appointment, and would not be reappointed if the previously filed accusation were proven unless they established their rehabilitation.

Section 11.

This section provides for the academic and professional qualifications for appointment as a QME. There are several minor grammatical changes, and changes in language for clarity. The term **osteopathic equivalent** is changed to **Osteopathic Postgraduate Training Institute**. Applicants for appointment, who were on probation or had restricted licenses, would have to state the nature of the restrictions on their application for appointment. An applicant who was suspected of cheating on the QME examination may be disqualified from the examination, and if the charge were substantiated, would be barred from taking the exam for at least two years thereafter. Acupuncturists would have to pass the newly defined QME Competency Examination for acupuncturists.

Section 11.

This section provides for the Disability Evaluation Report Writing Course. For clarity, to distinguish from other courses, the word **course** is modified by the words **report writing**. Only report writing courses offered by approved education providers would be qualified for appointment purposes. The part of the section describing the process of approving education providers is reworded for clarity. Many of the paragraphs of the section were re-lettered because of rewriting of the first paragraph for clarity.

Section 14.

This section provides for the academic and professional qualifications for appointment of chiropractors as QME's. The amendment specifies that courses will be approved for a two year period, and that no certification in workers compensation evaluation shall qualify unless subsequent to the licensing of the chiropractor.

Section 15.

This section specifies the basis for appointment as a retired or teaching physician. The section is reworded for clarity. The number of hours of practice allowed per week is increased from less than ten to no more than fifteen. Paragraph (d) providing for physicians who have retired from practice due to a disability is deleted. The time period during which a physician is to notify the IMC of a change in status is specified at 30 days. Currently, a physician who had a fulltime forensic practice during the three years immediately preceding the time of application would be ineligible for appointment under this section. The reference to the to the full time forensic practice during the three years immediately preceding the time of application would be deleted.

Section 17.

This section provides for a fee schedule for QME's. A typographical error is corrected.

Section 18.

This section provides for the time at which fees are to be paid by QME's. The section was rewritten for clarity, deleting unnecessary language. A requirement that QME's whose status had lapsed for more than two years would have to meet current requirements for eligibility and retake the report writing class was added.

Section 19.

This section provides for issuance of QME certificates. The first paragraph of this section was rewritten for clarity without substantive change. The second paragraph added a prohibition for a non-QME physician to display a QME certificate.

Section 20.

This section establishes time periods for the IMC to process applications. A new paragraph added that if there were an issue of whether the applicant met all the qualifications, the application would be deemed incomplete pending investigation.

Section 21.

This new section provides for examinations and applications. The IMC is to give notice of the examination at least 60 calendar days in advance. Applicants must have submitted completed forms at least 30 days before the examination. The IMC is to inform the applicant whether the applicant will be allowed to take the examination within 15 days of receiving a completed application and fee.

Section 30.

This section provides a system for unrepresented employees to request a panel of QME's, which the employee may do under Labor Code Sections 4061 or 4062. The amendment makes clear that the claims examiner or employer is obliged to complete sections one, two, and three of the form (prescribed in Section 106), and that only the employee may complete section four of the form, send it to the IMC, or select a QME specialty. The amendment also requires the employee to furnish his social security number on the form. Currently, when the IMC receives an incomplete form, it is required to return it with an explanation of why a QME panel selection cannot be made. The amendment would add the requirement that the IMC also notify the other party in the proceeding. The amendment would also add the provision that for employees who never resided in California, the geographic area of QME panel selection shall be by agreement between the employee and employer, or if no agreement, it shall be determined by the place of business of the employer where the employee had been employed.

Section 31

This section provides for the process of selecting a QME from a panel of QME's. The section now provides for selection at random from the *appropriate* specialty. The word ***appropriate*** is deleted. The amendment would add that the form listing QME's would now contain information on the QME's education, training, years of practice, and probationary status, and that probationary status would be noted in a footnote, with a direction to the employee to contact the IMC for further information regarding the probation, if any. Paragraph (d) is amended by substituting the phrase ***as defined in*** for the phrase ***and who has provided treatment in accordance with***. The sentence calling for disqualification of a QME is rephrased for clarity.

Section 31.5

This section provides reasons and methods for replacement of a QME panel member. The provision which would allow replacement of a physician on the request of the employee if he were a member of the same group practice as another member on the panel is changed to allow replacement at the request of either party. QME's are to provide reports within certain timeframes. The amendment would add a provision which would allow disqualification on the request of the employee if the physician failed to complete a report within the established timeframes. The section provides that any party may request replacement of a panel QME if the employees treating physician is on the panel. The amendment would also allow replacement if the employee's secondary physician or a physician designated by the primary physician to write a report, were on the panel. The paragraph allowing discretionary replacement of a panel for good cause is rephrased for clarity. The paragraph allowing the IMC Medical Director to replace a panel physician because the specialty chosen is inappropriate, is deleted.

Section 33.5

This new section provides for inactive status of QME's. QME's may retain their certificates for a minimal fee, if they no longer perform QME evaluations, if they go on inactive status. QME's can return to active status by notifying the Executive Medical Director. Before returning to active status, the physician must either have completed required hours of continuing education or have retaken the QME examination. It would be cause for discipline for a QME on inactive status to perform a medical examination requiring a QME certificate. Physicians called to active duty in the armed forces, would be able to resume the remainder of their QME term which was interrupted by military service.

Section 34.

This section currently provides that a QME examination may be conducted only at the QME office listed on the panel form. The amendment would permit the examination to be conducted at other locations upon the agreement of the employee and the claims administrator.

Section 35.

This section, which provides for exchange of information between the parties and the QME where the employee is not represented, is partially rewritten for clarity, and thus its paragraphs are re-lettered and renumbered. In addition to medical records, the amendment would allow the parties to provide a job analysis agreed to by the parties, and the record of any previous awards or settlements in any workers compensation proceeding. Another added sentence would make clear that the IMC may institute discipline against a QME for violating this section. An additional paragraph would define employer contact with the QME which is only about the provision of treating physician's records, not to be ex parte contact.

Section 35.5

This section which requires certain examinations to be performed according to IMC evaluation procedures is re-written for clarity. Use of the clause, ***to determine the existence and extent of permanent impairment and limitations resulting from an injury***, is substituted for a reference to Labor Code sections 4060, 4061, and 4062.

Section 38

This section provides for time frames in which QME examinations must be completed, and the granting of extensions of those times. The section is partially re-written for clarity. What used to be in paragraph (a) is now in paragraph (d). A new paragraph (a) is added to make clear that it applies to initial comprehensive evaluations and supplemental evaluations. QME's now have 60 days from the date of request, to complete a supplemental report, unless the parties have agreed to an extension. No consequence is now stated for not completing the supplemental report within 60 days. A provision is added that would entitle the employee to request a new panel of QME's if a QME fails to complete a requested supplemental report within 60 days.

Section 39

This section provides for when records may be destroyed. This section has minor wording changes made in it for clarity. There is no substantive change to the meaning of the section.

Section 39.5

This section provides for the retention of medical-legal reports for five years. It is reworded for clarity without substantive change. Additionally, a new sentence is added to allow for electronic form retention of reports if the documents contain a digital signature as defined in the Government Code.

Section 41

This section establishes some ethical requirements for QME's. QME's are now barred from ex parte communication in violation of Labor Code Section 4062.2. The amendment would also bar ex parte communication which is in violation of Section 35 of these regulations. The amendment would also prescribe that all discussions in the QME's medical report of medical issues, research, and conclusions shall be composed by the QME. It would also specifically bar previously used language created by a third party and language not written by the QME. It would also provide that a QME may not treat or solicit to provide medical treatment to an employee except as permitted in Section 11(d) (which permits emergency treatment or treatment after the employee has requested it be provided by the QME). The amendment would also provide that no QME shall engage in inappropriate physical contact or make inappropriate or offensive comments not related to the examination.

Section 49

This section provides additional definitions for Article 4.5 of the Regulations, relating to minimum time guidelines. The definition of QME has been moved to Section 1, the principal definitional section. For clarity, the words **by the evaluator** are added to a description of time spent on research, record review, and report writing. This makes no substantive change.

Section 49.2

This section prescribes minimum time guidelines for a neuromusculoskeletal evaluation. The phrase, **including an injury to the foot and ankle** is added, to make it clear that these injuries fall within this guideline.

Section 49.4

This section prescribes minimum time guidelines for a cardiovascular evaluation. There is a rephrasing which has no substantive effect.

Section 49.6

This section prescribes minimum time guidelines for a pulmonary evaluation. There is a rephrasing which has no substantive effect.

Section 49.8

This section prescribes minimum time guidelines for a psychiatric evaluation. There is a rephrasing which has no substantive effect.

Section 49.9

This section prescribes minimum time guidelines for evaluations not otherwise specified. There is a rephrasing which has no substantive effect.

Section 50

This section prescribes the process for applying for reappointment as a QME and for the application form. There are several minor word insertions for clarity. The amendment adds to the application form requirements that the applicant state whether the applicant has been convicted of any criminal charge, and if so what; that the applicant state whether the applicant is currently the subject of an accusation by the applicant's licensing board; that the applicant state how many QME reports the QME has prepared; that the applicant sign the application under penalty of perjury.

Section 52

This section provides that QME's may be denied reappointment if they have failed to notify the IMC of periods of unavailability to perform QME evaluations. The amendment would change the period covered by the obligation to report unavailability from a calendar year to the fee period of the QME, as defined.

Section 58

This new section would provide that the IMC may deny reappointment to a QME who would no longer meet the requirements for initial appointment.

Section 60

This section defines the grounds for discipline of QME's. There are several word changes for clarity which have no substantive effect. The amendment would also provide that the IMC may institute or continue a disciplinary proceeding against a QME even if the QME resigns, the appointment expires, or the QME certification is forfeited by operation of law. The section lists some offenses which may occasion imposition of discipline, one of which is ex parte contact prohibited by Labor Code Section 4062.2. The amendment would also provide that ex parte contact prohibited by Section 35 of these regulations is also such an offense.

Section 61

This section delineates the hearing procedure to be followed for QME discipline. There are several changes in phrasing without substantive effect. The section provides that an

administrative law judge or hearing officer shall file a written statement of findings and decisions after a decision has been made regarding the existence of a prima facie case, and after a hearing. The amendment would delete the reference to a decision about the existence of a prima facie case as duplicative of an earlier requirement that a committee find the existence of a prima facie case.

Section 62

This section provides for a procedure for probation of disciplined QME's. There are several rephrasings which have no substantive effect.

Section 63

This new section provides for the process of using and serving a notice of denial and statement of issues in connection with the denial of appointment, reappointment, and certification as an education provider. The section would provide that the council would notify applicants whose applications were to be denied. The IMC could either serve a statement of issues of matters to be contested per Title2, Division 3, Part 1, Chapter 5 (beginning with section 11500) of the Government Code to begin a contested proceeding, or notify the applicant that the application is denied and of the applicant's right to a hearing. It would further provide that unless the applicant made a written request for hearing within 60 days, the applicant's right to a hearing would be deemed waived.

Section 156

This section provides for the IMC to request to view and to review QME advertising copy. There are several word changes for clarity which have no substantive effect.

Section 157

This section provides for determinations of the IMC and appeals regarding QME advertising copy which the IMC has requested to review. The section now provides for the Medical Director to make a preliminary determination that it violates Business and Professions Code Section 651. The IMC is to hold a hearing on the Medical Director's preliminary determination. If the IMC sustains the Director's determination and the physician is not a QME, the IMC is to refer the matter to the licensing board. If the IMC sustains the Director's determination and the physician is a QME, the IMC is to hold a hearing or delegate the hearing to an administrative law judge. If the complaint is sustained, the QME has 30 days to file a notice of appeal, in which case, three members of the IMC shall serve as an appellate panel. The appellate panel is to hear the appeal and recommend a decision to the IMC. The IMC is to take appropriate action on the recommended decision. A complete copy of the record is to be furnished each IMC member before the IMC takes final action. The director is to forward the final decision of the IMC to the licensing board.

The amendment would rewrite the section. If the Director made a preliminary determination of violation, the matter would be referred to the Discipline Committee. If the Committee sustained the Directors determination, the QME would be notified of a right to a hearing. A hearing may be held by either a hearing officer designated by the Director or by an administrative law judge. If a decision sustained the determination, it should be recommended to the IMC, along with recommended sanctions. The council may adopt the decision, or decide to take the case unto itself as a body. The QME may petition for reconsideration of an adverse

decision within 30 days. Judicial review may be had by filing a petition within 30 days of an adverse decision.

Section 158

There is one occasion in which the word *their* is substituted for the phrase *his or her*.

Comparable Statutes and Regulations:

There are no comparable federal statutes or regulations.

DISCLOSURES REGARDING THE PROPOSED ACTION

The IMC has made the following initial determinations with respect to these proposals. These proposals impose no significant mandates, costs, or savings that are different or distinct from what the Legislature has required by statute.

Mandates on Local Agencies or School Districts:

The proposals do not impose mandates on local agencies or school districts distinct from those imposed by statute. The IMC has determined that the proposed regulations will not impose any new mandated program on local agencies or school districts.

Costs or Savings to State Agencies; Reimbursable Costs Imposed on Local Agencies or School Districts; other nondiscretionary costs or savings imposed on local agencies; and costs or savings in federal funding to the state:

The proposals do not impose any reimbursable costs on local agencies or school districts.

The proposals do not involve any costs or savings for local agencies.

The proposals do not involve any costs or savings in federal funding to the state.

Initial Determination of Economic Impact on Business:

The IMC has made an initial determination that these proposals will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. The Qualified Medical Evaluator statutes and regulations are neutral in their treatment of California businesses as compared to businesses from other states. Qualified Medical Evaluators are not businesses, but individuals subject to regulation, and none of the proposed changes will affect Qualified Medical Evaluators substantially differently than existing regulations.

Known Cost Impacts on Representative Private Person or Business:

These proposals are directed primarily at Qualified Medical Evaluators. The IMC is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with these proposed regulations.

Creation, Elimination, or Expansion of Jobs or Businesses (Results of Assessment under Government Code section 11346.3(b)):

The IMC has made initial determinations that (1) these proposals will not affect the creation or elimination of jobs within the State of California; (2) these proposals will not affect the creation of new businesses or the elimination of existing businesses within the State of California; and (3) these proposals will not affect the expansion of businesses currently doing business within the State of California.

Reporting Requirements (Finding under Government Code section 11346.3(c)):

These proposals impose no reporting requirements on businesses.

Effect on Housing Costs:

These proposals have no effect on housing costs.

Effect on Small Business:

The IMC has made an initial determination that these proposals will not affect small business. The reason for this determination is that the proposals consist of a series of amendments designed to improve and make more clear regulations of the Qualified Medical Evaluator program, and the proposals will have no effect on small business distinct from the statutes and existing regulations. The proposals and the regulations they would amend are directed at Qualified Medical Evaluators. None of the proposals are regulations that small businesses legally would be required to comply with or that small businesses legally would be required to enforce. Small business will derive no new or distinct benefit nor will they incur any new or distinct detriment from the enforcement of these proposals.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5(a)(13), the IMC must determine that no reasonable alternative considered by the IMC or that otherwise has been identified and brought to the IMC's attention would either be more effective in carrying out the purpose for which the action is proposed or be as effective as the proposed action and less burdensome to affected private persons. These proposals consist of a series of amendments to existing regulations governing Qualified Medical Evaluator Program, and the adoption of several new regulations. The amendment of these existing regulations and the adoption of the new regulations appears to be the most feasible solution to eliminate the problems seen in the Qualified Medical Evaluator program.

The IMC invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations during the written comment period.

PUBLIC DISCUSSIONS OF PROPOSED REGULATIONS

A pre-notice workshop, pursuant to Government Code Section 11346.45, is not required to implement the proposed regulations, because the issues addressed are not so complex that they cannot easily be reviewed during the comment period.

However, text of the draft proposed regulations has been the subject of discussion at noticed meetings of the Education Committee and the Quality Assurance Committee of the IMC, where public comment was invited, before the IMC proposed the adoption of the regulations.

AVAILABILITY OF INFORMATION PERTAINING TO THE PROPOSED ACTION

The IMC will have the rulemaking file available for inspection and copying throughout the rulemaking process. As of the date of this Notice the file consists of this notice, the initial statement of reasons, and the text of the proposed regulations. The entire rulemaking file may be inspected during the hours of 8:30 a.m. to 4:00 p.m., Monday through Friday, excluding public holidays, at:

Industrial Medical Council
395 Oyster Point Blvd, Suite 102
South San Francisco, California

Copies may be ordered by contacting the agency contact person listed above.

Website:

Rulemaking records, including the text of the proposed regulations, may be accessed through the Department of Industrial Relations' Internet website at www.dir.ca.gov. To access them, click on the "Proposed Regulations - Rulemaking" link and scroll down the list of rulemaking proceedings to find the current Qualified Medical Evaluator rulemaking link.

Availability of Changed or Modified Text:

After considering all timely and relevant comments received, the IMC may adopt the proposed regulations substantially as described in this notice. If the IMC makes modifications which are sufficiently related to the originally proposed text, the modified text (with changes clearly indicated) will be made available to the public for at least 15 days before the IMC adopts

the regulations as revised. Any such modifications will also be posted on the Department's website at www.dir.ca.gov. To access it click on the “Proposed Regulations - Rulemaking” link and scroll down the list of rulemaking proceedings to find the current Qualified Medical Evaluator rulemaking link. Please send requests for copies of any modified regulations to the attention of the contact person listed above. The IMC will accept written comments on the modified regulations for 15 days after the date on which they are made available.

Availability of the Final Statement of Reasons and the Rulemaking File:

Upon completion, the Final Statement of Reasons will be available and the entire rulemaking file may be obtained from the contact person named in this notice, or may be accessed on the Department of Industrial Relations' website at www.dir.ca.gov. To access it click on the “Proposed Regulations - Rulemaking” link and scroll down the list of rulemaking proceedings to find the current Qualified Medical Evaluator rulemaking link, and the link to Final Statement of Reasons within it.

AUTOMATIC MAILING

A copy of this Notice, including the Informative Digest, will automatically be sent to those interested persons on the IMC's mailing list.

If adopted, the proposed regulations as amended will appear in Title 8, California Code of Regulations, Chapter 1.